IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

DATATREASURY CORP.	§	No. 2:06CV-165 (DF)
	§	Hon. David J. Folsom
Plaintiff	§	JURY TRIAL DEMANDED
	§	
vs.	§	
	§	
CITY NATIONAL CORPORATION; and CITY NATIONAL BANK,	§	
	§	
Defendants.	§	
	§	

DEFENDANTS' MOTION (1) TO DISMISS FOR LACK OF PROPER VENUE; (2) TO DISMISS FOR FAILURE TO STATE A CLAIM; OR, IN THE ALTERNATIVE, (3) FOR MORE DEFINITE STATEMENT; AND JOINDER IN JOINT MOTION OF DEFENDANTS TO DISMISS, OR IN THE ALTERNATIVE, FOR MORE DEFINITE STATEMENT IN CASE NO. 2:06-CV-72 DF

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Defendants City National Corporation and City National Bank (collectively, "CNB Defendants"), by their attorneys, hereby move the Court for an order pursuant to Federal Rule of Civil Procedure 12(b)(3) dismissing the claims asserted against them in the Complaint For Patent Infringement ("CNB Complaint") filed by plaintiff DataTreasury Corporation ("DTC") for improper venue. The CNB Defendants also hereby move the Court for an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing those claims for failure to state a claim upon which relief may be granted. In the alternative, the CNB Defendants hereby move pursuant to Federal Rule of Civil Procedure 12(e) for a more definite statement of DTC's claims. The CNB Defendants hereby request oral argument of this motion at such time as is convenient to the Court.

I. INTRODUCTION

The CNB Complaint alleges that the CNB Defendants are liable for infringement of four patents—U.S. Patent Nos. 5,265,007, 5,717,868, 5,910,988, and 6,023,137 (collectively, the "patents-in-suit"). All of the patents-in-suit claim products or methods for processing checks, documents, or receipts. To maintain its claims in this Court, DTC bears the burden of proving that venue is proper in the Eastern District of Texas (the "District") for each of the DTC Defendants. DTC must also set forth allegations in the CNB Complaint with sufficient clarity to give the DTC Defendants fair notice of what DTC's claims are and the grounds upon which they rest. DTC has done neither.

This motion is divided into two parts. The first (Section II below) demonstrates why venue is improper in the District. The second (Section III below) demonstrates why the CNB Complaint should be dismissed for failure to state a claim or why, in the alternative, DTC should be compelled to provide a more definite statement of its claims. This second portion relies on many of the same arguments and legal principles presented in the Joint Motion Of Defendants

To Dismiss, Or In The Alternative, For More Definite Statement filed concurrently in the parallel case of *DataTreasury Corp. v. Wells Fargo & Co., et al.*, Case No. 2:06-CV-72 DF (the "Wells Fargo Litigation").[1] Rather than repeat those arguments here, the CNB Defendants join in that Motion, attached hereto as Exhibit A, and incorporate it by reference.

II. DTC'S CLAIMS AGAINST THE CNB DEFENDANTS SHOULD BE DISMISSED FOR IMPROPER VENUE

Title 28 U.S.C. § 1400(b) is the exclusive venue statute for patent infringement claims against United States residents.[2] *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579-80 (Fed. Cir. 1990). To establish venue under section 1400(b), DTC must prove either that (1) the CNB Defendants are subject to personal jurisdiction in the District or (2) the CNB Defendants have an established place of business within the District and have committed acts of infringement within the District. DTC cannot satisfy either prong of section 1400(b).

DTC attempts to establish personal jurisdiction over each CNB Defendant by asserting three vague and conclusory allegations against "Defendants" in the aggregate. First, DTC alleges that general personal jurisdiction exists by virtue of the CNB Defendants' "business conducted

[1] The CNB Defendants were initially joined as defendants in the Wells Fargo Litigation. On April 19, 2006, DTC voluntarily dismissed the CNB Defendants from that case, having re-filed essentially the same complaint against just the CNB Defendants. (*See* Case 2:06-CV-72 DF Dkt No. 58 (4/19/06 Notice of Dismissal); Case 2:06-CV-72 DF Dkt No. 60 (4/20/06 Order Granting Dismissal); Dkt No. 1 (4/18/06 CNB Complaint)). It appears that DTC's sole reason for this maneuver was to add an allegation that the CNB Defendants are owners and participants in Small Value Payments Company, LLC. DTC apparently chose to make the amendment by filing a separate lawsuit against the CNB Defendants instead of just amending the Wells Fargo Amended Complaint, to avoid the burden of re-serving the Wells Fargo Amended Complaint on some 56 defendants.

[2] DTC also asserts that venue is proper pursuant to 28 U.S.C. § 1391(b), (c) and (d). (CNB Complaint at ¶ 6.) Because this is a patent infringement case, these general venue statutes are not applicable. *E.g.*, *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942) (predecessor to section 1400(b) found to be the "exclusive provision controlling venue in patent infringement actions"); *VE Holding*, 917 F.2d at 1580 (specifically rejecting the notion that the

within the State of Texas and within this district." (CNB Complaint, at ¶ 5.) Second, DTC alleges that specific personal jurisdiction exists by virtue of the CNB Defendants' "making, using, selling, offering to sell, and/or importing, directly, contributorily, and/or by inducement, infringing products and services within the State of Texas and within this District," and in particular having "provided services and sold products in this District separately and with or for other infringing companies which are or were Defendants in related pending litigation the [sic] United States District Court for the Eastern District of Texas." (*Id.*) Third, DTC alleges that specific personal jurisdiction is proper by virtue of the CNB Defendants' "infringing activities with relation to the products and services of Small Value Payments Co., LLC ["SVPCo"] and The Clearing House Payments Company ["The Clearing House"]," because "[b]y their ownership and use of SVPCo, these Defendants have authorized, participated in, or facilitated transactions occurring in whole or in part within this District that, in whole or in part, infringe the patents asserted against them herein."[3] (*Id.* at ¶ 8.)

These three unsupported—and unsupportable—allegations do not justify the exercise of personal jurisdiction over either CNB Defendant. City National Corporation (the "Corporation") is a holding company. Its sole business is the ownership of subsidiaries, none of which is located in the District. The Corporation does not do business in the District and has no involvement with check processing products or activities whatsoever (in the District or elsewhere). Nor does the Corporation own, use, or have any other involvement with The Clearing House or SVPCo.

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general corporate defendant venue statute § 1391(c) "establishes a patent venue rule separate and apart from that provided under § 1400(b)").

[3] The Clearing House is a private provider of U.S. dollar clearing, settlement and related services. Payment services include paper, paper-to-electronic, ACH, and wire electronic payments. SVPCo provides electronic check and clearing services for The Clearing House.

City National Bank (the "Bank"), like the Corporation, has no presence in the District. The Bank is a regional bank with about 50 offices in California and one office in New York. The Bank is ***not*** related to the "City National Bank" with branches in Kilgore, Longview, and Gladewater, Texas. In fact, the Bank has no substantial, continuous, or systematic contacts with the District, and it has never purposefully directed any allegedly infringing activities toward the District. The Bank also does not use The Clearing House or SVPCo for any allegedly infringing check processing services related to the District. While the Bank does have a limited membership in The Clearing House, the law is clear that such membership, without more, does not support personal jurisdiction over foreign entities.

The facts demonstrate that, contrary to DTC's allegations, the assertion of personal jurisdiction over either Defendant would conflict with established Federal Circuit policy and would offend traditional notions of fair play and substantial justice. As a regional bank principally based in California, with a single office in New York, the Bank would have no expectation of being haled into court in this District. The same can be said of the Corporation, a mere holding company that hasn't anything to do with this District.

Similarly, DTC cannot satisfy the second prong of 28 U.S.C. § 1400(b). Neither Defendant has an established place of business within the District. Nor has either Defendant committed any allegedly infringing acts within the District. Accordingly, the CNB Defendants' motion to dismiss for lack of proper venue should be granted.

A. Venue Is Improper Under The First Prong Of 28 U.S.C. § 1400(b) Because The CNB Defendants Do Not Have Minimum Contacts With The District And Thus Are Not Residents Of The District

The first prong of section 1400(b) provides that venue is proper in a patent infringement action "where the defendant resides." Under section 1400(b), "a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c); *see VE Holding*, 917 F.2d at 1580 (section 1391(c) defines a term in section 1400(b)). A corporation is deemed to reside within a judicial district in a multi-district state like Texas if "its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State." 28 U.S.C. § 1391(c).

DTC bears the burden of proving a *prima facie* case that the Court has personal jurisdiction over each Defendant. *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually."); *Quick Techs., Inc. v. Sage Group PLC*, 313 F.3d 338, 343 (5th Cir. 2002) (plaintiff bears burden of establishing contacts sufficient to invoke court's jurisdiction). Although uncontroverted allegations in a complaint are accepted as true for purposes of the jurisdictional analysis, "such acceptance does not automatically mean that a *prima facie* case for specific jurisdiction has been presented . . . the *prima-facie* case requirement does not require the court to credit conclusory allegations, even if uncontroverted." *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001). Here, not only are DTC's allegations relating to personal jurisdiction are entirely conclusory, but also the CNB Defendants have submitted declarations controverting every such allegation.[4] Accordingly, DTC must satisfy its burden of proof with factual evidence, and may not rest on its conclusory pleading. *Id.*; *see also Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1282-83 (Fed. Cir. 2005) (remanding for further evidence where, "although the record suggests that [the plaintiff] made a prima facie showing of personal jurisdiction in the district court, that evidence is sparse and contains gaps").

To show that personal jurisdiction is appropriate for any given defendant, the plaintiff must establish that the exercise of personal jurisdiction over that defendant comports with constitutional due process. *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565, 1569 (Fed. Cir. 1994) (plaintiff must prove that defendant is within reach of state long-arm statute and that constitutional due process is satisfied); *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985) (Texas long-arm statute is coextensive with the limits of constitutional due process).[5] This requires DTC to prove, based on more than conclusory statements, that: (1) either "specific" or "general" personal jurisdiction exists with respect to each Defendant and that (2) the assertion of jurisdiction would not offend traditional notions of fair play and substantial justice. *Beverly Hills Fan*, 21 F.3d at 1565; *Panda Brandywine*, 253 F.3d at 869.

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[4] All declarations in support of this motion shall be cited as: ____ Decl., at ¶___.

Specific personal jurisdiction is appropriate only if (1) the defendant purposefully directed its activities at residents of the forum, (2) the claim arises out of or relates to those activities, and (3) the assertion of personal jurisdiction would be reasonable and fair. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1378 (Fed. Cir. 1998) (articulating three-prong test). Specific personal jurisdiction must be established for each Count of a complaint—here, that requires proof of proper jurisdiction for each patent-in-suit. *See Silent Drive, Inc. v. Strong Indus.*, 326 F.3d 1194, 1201 (Fed. Cir. 2003) (performing separate personal jurisdiction analysis for separate claims).

General personal jurisdiction requires a significantly greater showing: DTC must prove that each Defendant has substantial, continuous and systematic contacts with the District. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984). This standard is "broader and more demanding" than the standard for specific personal jurisdiction, requiring

[5] Federal Circuit law governs the Court's exercise of personal jurisdiction in patent infringement cases. *Beverly Hills Fan*, 21 F.3d at 1564-65.

"a showing of substantial activities in the forum state." *Jones v. Petty-Ray Geophysical, Geosource, Inc.*, 954 F.2d 1061, 1068 (5th Cir. 1992).

DTC cannot carry this heavy burden for either the Corporation or the Bank.

1. Jurisdiction Over The Corporation Is Inappropriate Because It Is Merely A Holding Company

Each of DTC's three asserted bases for jurisdiction fails with respect to the Corporation. First, DTC's assertion of general personal jurisdiction against the Corporation is unfounded. The Corporation is purely a holding company with no subsidiaries in the District. (Hom Decl., at ¶ 3.) It has no meaningful contacts with the District, much less the sort of continuous and systematic contacts that would justify the exercise of general personal jurisdiction. For example, it is not incorporated in the District. (*Id.* at ¶ 4.) It has never performed (nor is it authorized to perform) any banking-related services in the District, or anywhere else for that matter. (Spence Decl., at ¶ 3.) It does not have a corporate office, branch office or any other facility in the District. (Raczek Decl., at ¶ 2.) It does not own or rent real estate, maintain a mailing address, or have a telephone number in the District. (*Id.*; Taylor Decl., at ¶ 2.) None of its officers, directors, employees or representatives resides or is domiciled in the District. (Gilson Decl., at ¶ 3.) And it has never conducted meetings of its board or shareholders in the District. (Spence Decl., at ¶ 2.)

Second, the Corporation has no contacts with the District that would give rise to specific personal jurisdiction. The Corporation has not purposefully directed any activities toward the District, much less activities that could serve as the basis for DTC's claims. (*Id.* at ¶ 3; Hom Decl., at ¶ 3.) Moreover, the Corporation could not have purposefully directed any relevant activities toward the District (or anywhere else) because it does not process checks or other financial transaction records, and does not make, use or sell products related to the processing of checks or other financial records.[6] (Spence Decl., at ¶ 3; Hom Decl., at ¶ 3.)

Third, DTC's allegations regarding SVPCo and The Clearing House have no bearing on jurisdiction over the Corporation. Indeed, the Corporation does not even have an ownership interest or membership in SVPCo or The Clearing House. (Spence Decl., at ¶ 3.)

For these reasons, the exercise of general personal jurisdiction over the Corporation would violate its due process rights. Accordingly, the Court should dismiss DTC's claims against the Corporation for lack of personal jurisdiction.

2. Jurisdiction Over The Bank Is Inappropriate Because The Bank Does Not Have Sufficient Minimum Contacts With The District

DTC also bears the burden of proving either specific or general personal jurisdiction over the Bank. *Calder*, 465 U.S. at 790. It should be noted at the outset that the Bank is not affiliated with the "City National Bank" located in Longview, Kilgore and Gladewater, Texas. (Spence Decl., at ¶ 6.) As is detailed below, the Bank is a regional bank with branches in California and New York and no relevant contacts with the District. Thus, DTC cannot satisfy the personal jurisdiction standard.

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[6] Nor does the Corporation's ownership of the Bank give rise to personal jurisdiction over the Corporation. Even if the Court were to find jurisdiction proper over the Bank—which it should not—the law is clear that an ownership interest in a corporation is not sufficient to justify the exercise of personal jurisdiction, and that jurisdiction over a holding company is inappropriate without a showing that the holding company made, used, or sold the accused products. *3D Sys.*, 160 F.3d at 1380 (ownership of subsidiary that was subject to personal jurisdiction did not justify exercise of jurisdiction over parent); *see also Benjamin Obdyke Inc. v. Owens Corning*, No. 02-CV-8408, 2004 U.S. Dist. LEXIS 7238, at *9-*10 (E.D. Pa. Mar. 29, 2004) (no jurisdiction over holding company without showing actions on its part to make, use or sell).

a. General Personal Jurisdiction Over The Bank Is Inappropriate Because The Bank Does Not Have Continuous Or Systematic Contacts With The District

DTC cannot support its claim of general personal jurisdiction over the Bank. The Bank is a regional institution with about 50 offices in Southern California and the San Francisco Bay area (and a single office in New York). (Raczek Decl., at ¶ 3.) Thus, all of the Bank's actions are undertaken and completed in either California or New York.

Like the Corporation, the Bank's activities do not bear the hallmarks associated with the exercise of general personal jurisdiction: The Bank has no headquarters, offices, facilities, or physical presence in or near the District. (Raczek Decl., at ¶ 3.) It does not have telephone listings or mailing addresses in the District. (Taylor Decl., at ¶ 3; Raczek Decl., at ¶ 3.) None of its officers, directors, employees or other company representatives resides in or is domiciled in the District. (Carlos Decl., at ¶ 3.) It has not contracted with any persons residing in the District with respect to marketing, advertising or promotion of the Bank. (Kopec Decl., at ¶ 2.) It does not own any real property or other tangible property in the District, and does not rent any physical facilities in the District. (Raczek Decl., at ¶ 3.) No meetings of its board of directors or shareholders have ever been conducted in the District. (Spence Decl., at ¶ 4.) The Bank has never initiated suit in nor otherwise sought to utilize the court systems of the District. (*Id.* at ¶ 5.) Nor has the Bank purposefully directed any activities toward the District: It has not solicited business in the District or engaged in marketing or advertising designed to reach an audience in the District. (Kopec Decl., at ¶ 3.).

The Bank's sole contacts with the District are three loans with aggregate outstanding balances of about $424,000 whose borrowers list addresses in the District;[7] one active loan secured by property in the District; and records of about 132 accounts held by customers with mailing address in the District, but originating out of and maintained by Bank facilities in California. (Wade Decl., at ¶ 2; Maniktala Decl., at ¶¶ 2, 3; Brody Decl., at ¶ 2; Garza Decl., at ¶ 2; Farren Decl., at ¶ 2.) The loans represent under .005 percent of the Bank's total loan portfolio. (Maniktala Decl., at ¶ 2.) Similarly, the current aggregate account balance of those accounts with mailing addresses in the District represent under .00745 percent of the Bank's total account balance. (Wade Decl., at ¶ 2.) These contacts do not rise to the level of systematic, continuous contacts required for the exercise of general personal jurisdiction. In fact, courts routinely decline to exercise general personal jurisdiction over out-of-state banks in analogous situations because, as the Seventh Circuit explained, "it would be unreasonable to charge each bank with knowledge that it may at any time be called to answer in the courts of any of the fifty states from which a check cashed by one of its customers originated." *Froning & Deppe, Inc. v. Continental Ill. Nat'l Bank & Trust Co.*, 695 F.2d 289, 291-92 (7th Cir. 1982); *see also Resolution Trust Corp. v. First of Am. Bank*, 796 F. Supp. 1333, 1335-37 (C.D. Cal. 1992) (mere membership in national clearinghouse and a few minor instances of business in the forum insufficient to find general personal jurisdiction over bank); *Fries v. Norstar Bank, N.A.*, No. 88-537, 1988 U.S. Dist. LEXIS 10999, at *2 (D. Md. Aug. 31, 1988) ("the conduct of normal banking operations together with acceptance and endorsement of a check is not sufficient to meet the [general] jurisdictional requirements of minimal contacts and due process"); *Stallworth v.*

[7] While the Bank has three borrowers with mailing addresses in the District, each of these borrowers had its primary business operations in California or was a California resident when the loan was initiated. (Farren Decl., at ¶ 2; Garza Decl., at ¶ 2; Brody Decl., at ¶ 2.)

First Nat'l Bank of Mobile, 592 F. Supp. 1250, 1251-52 (M.D. La. 1984) (standard banking relationship with venue, including a few loans to Louisiana residents and about one hundred bank accounts to Louisiana residents, was insufficient for general personal jurisdiction); *see also Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank*, 701 F.2d 889, 893-94 (11th Cir. 1983) (evidence of ordinary relationship between banks, such as transfers of client money, is not enough to establish personal jurisdiction over foreign bank).

b. Specific Personal Jurisdiction Is Unwarranted Because The Bank Has Not Purposefully Conducted, Induced, Or Contributed To Any Allegedly Infringing Activities In Or Directed To The District

Similarly, DTC cannot establish specific personal jurisdiction over the Bank because it cannot meet its burden of showing that the Bank purposefully directed activities at residents of the forum and that DTC's claim arises out of or relates to those activities. *See 3D Sys.*, 160 F.3d at 1378. The CNB Complaint offers only the oblique allegation that the Bank "provided services and sold products in this District separately and with or for other infringing companies which are or were Defendants in relating pending litigation the [sic] United States District Court for the Eastern District of Texas." (CNB Complaint, at ¶ 5.) DTC does not say anything about what "products or services" that the Bank purportedly sold in this District, nor to whom they were purportedly sold. Yet regardless of the meaning of this unsupported allegation, DTC's claims simply could not arise out of activities that the Bank purposely directed at the District. This is because all of the allegations in the CNB Complaint relate to the processing of checks, documents, receipts, or payments.[8] The Bank's procedures for processing checks, documents,

[8] *See* CNB Complaint, Count One (asserting '988 patent, all claims of which relate to processing of documents and receipts); Count Two (asserting '137 patent, all claims of which relate to processing of checks); Count Three and ¶ 11 (asserting '007 patent, which relates to "a central check clearing system"), and Count Four and ¶ 12 (asserting '868 patent, which relates to "an electronic payment interchange concentrator").

receipts, and payments are ***not in any way*** directed at the District. (Fertal Decl., at ¶ 2.) This is true for the Bank's check clearing procedures, as well as the Bank's limited "City National E-Deposit" electronic remote deposit product. (Zerrudo Decl., at ¶ 2.) In clearing checks, regardless of a check's origin or the location of the bank on which the check is drawn, the Bank does not have direct contact with any banks outside of California or New York. (Fertal Decl., at ¶ 2.) The Bank's City National E-Deposit product, which allows certain qualifying business customers to deposit checks remotely using specialized scanners and software, has not been implemented for any person or entity in the District. (Zerrudo Decl., at ¶ 2.)

Moreover, to the extent that the Bank has indirect contact with District banks by clearing checks from such banks, the law is clear that such contact does not merit the exercise of jurisdiction. Rather, it is a quintessential example of unilateral activity by a third party, which is legally insufficient to prove that a defendant directed any activities to or purposefully availed itself of the forum. As the Supreme Court has explained, "Common sense and everyday experience suggest that, absent unusual circumstances, the bank on which a check is drawn is generally of little consequence to the payee and is a matter left to the discretion of the drawer. Such unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros*, 466 U.S. at 416-17; *see also Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360-61 (Fed. Cir. 1998) ("[T]he Supreme Court has made clear that contacts resulting from 'the unilateral activity of another party or third person' are not attributable to a defendant."). Because the Bank is required to process all checks cashed by its customer regardless of the bank upon which the check is drawn, (Fertal Decl., at ¶ 3), it would be unreasonable to assert jurisdiction over the Bank based on a customer's choice to cash a check drawn on a bank located in the District.[9] *Froning*, 695 F.2d at 291 ("in view of the enormous volume of interstate check processing which every bank performs on a daily basis, it would be unreasonable to charge each bank with knowledge that it may at any time be called to answer in the courts of any of the fifty states from which a check cashed by one of its customers originated"); *Fries*, 1988 U.S. Dist. LEXIS 10999, at *2 ("the conduct of normal banking operations together with acceptance and endorsement of a check is not sufficient to meet the jurisdictional requirements of minimal contacts and due process").

Similarly, there is no support for DTC's bare allegation that the Bank subjected itself to jurisdiction by actively inducing or contributing to infringement by residents of the District. (CNB Complaint, at ¶ 5.) Where jurisdiction is based on allegations of indirect infringement, the ***intent to cause infringement in the forum*** is the keystone of the jurisdictional analysis. *See Beverly Hills Fan*, 21 F.3d at 1567-68; *Sitrick v. Freehand Sys., Inc.*, No. 02-C-1568, 2004 U.S. Dist. LEXIS 19397, at *11-*13 (N.D. Ill. Sept. 27, 2004). The CNB Complaint says nothing about what the Bank purportedly did or which residents were induced to commit infringement. Moreover, and more importantly, the Bank has never intended to cause any activity in the District, has never purposefully directed any activities in the District, and has never caused

[9] To the extent that DTC attempts to argue that the Bank is subject to jurisdiction because its website would permit users to access account information, including check images, from the District, this argument fails for the same reason. A user's election to access a website from a given location is a classic example of unilateral activity, since all of the Bank's actions occur outside the District. (Fertal Decl., at 5); *Helicopteros*, 466 U.S. at 416-17; *Red Wing*, 148 F.3d at 1360-61. Second, Federal Circuit precedent is clear that "the ability of District residents to access the defendants' websites . . . does not by itself show any persistent course of conduct by the defendants in the District." *Trintec*, 395 F.3d at 1281 (finding that the defendant's interactive website was not enough to establish specific personal jurisdiction because it was not directed specifically at forum residents and plaintiff failed to introduce evidence that the forum's residents transacted business through the website).

infringement in the District. (Fertal Decl., at ¶¶ 2, 4; Zerrudo Decl., at ¶ 2; Kopec Decl., at ¶ 3.) Therefore, this argument does not support specific personal jurisdiction over the Bank.

The Bank's only direct contacts with the District—a few loans and a handful of accounts—have absolutely no relationship with claims of the patents-in-suit. Thus, DTC has failed to show that the Bank has performed any allegedly infringing activities within the District, and the exercise of specific personal jurisdiction over the Bank would be inappropriate.

c. The Bank's Relationship With SVPCo and The Clearing House Is Irrelevant

DTC cannot support its claim of jurisdiction based on allegations that the Bank owns and/or utilizes allegedly infringing services of SVPCo and The Clearing House. (CNB Complaint, at ¶¶ 7-8.) This assertion is inaccurate and irrelevant to the jurisdiction analysis.

First, while the Bank has a limited membership in The Clearing House, it does not use, and has never used, The Clearing House or SVPCo to perform any allegedly infringing services in the District.[10] (Fertal Decl., at ¶ 4.) The Bank does not use the "nationwide check image archive and exchange service" that DTC identifies as its basis for jurisdiction over the Bank through SVPCo and The Clearing House. (CNB Complaint, at ¶ 8.) Rather, the only services for which the Bank uses SVPCo or The Clearing House are the coordination of the ***local*** exchange of paper checks, and online settlement and adjustments, which the Bank uses to calculate and confirm the settlement of locally exchanged paper checks, and to make adjustments. (Fertal Decl., at ¶ 4.) Because the Bank uses this online service only with respect to the exchange of checks within California, (*Id.*), the Bank's use of this service does not involve the District in any way. Second, the law is clear that mere membership in The Clearing House is

[10] As the Court undoubtedly knows, SVPCo is the check and electronic clearing service of The Clearing House. (Fertal Decl., at ¶ 4.)

not a sufficient basis upon which to support a claim of personal jurisdiction. *Resolution Trust*, 796 F. Supp. at 1336-37 (participation in national clearinghouse and a few minor instances of business in the forum were not enough to find personal jurisdiction over bank); *3D Sys.*, 160 F.3d at 1380 (reversing district court's assertion of personal jurisdiction based solely on its ownership of a subsidiary subject to personal jurisdiction).[11] Therefore, the Bank's relationship with The Clearing House and SVPCo is insufficient to support the exercise of personal jurisdiction over the Bank.

3. Asserting Jurisdiction Over Either Defendant Would Violate The Principles Of Fair Play And Substantial Justice

DTC also cannot satisfy the burden of proving the remaining jurisdictional requirement—for both general and specific personal jurisdiction—that the exercise of jurisdiction comports with principles of fair play and substantial justice. *Beverly Hills Fan*, 21 F.3d at 1568-69. Here, dragging the CNB Defendants into a distant jurisdiction with which they have no substantial contacts and to which they have never directed any allegedly infringing check processing activities is unduly burdensome and unfair. None of the likely trial witnesses, from any party, reside in the District. (Weiss Decl., at ¶¶ 2-5, Exs. A-E; Carlos Decl., at ¶ 2; Gilson Decl., at ¶ 3.) The Corporation has no ties to the District and does not engage in any check processing at all. The Bank is a regional institution, with offices in California and one office in New York, and it does not solicit customers in the District, or direct marketing or advertising efforts toward the District. (Raczek Decl., at ¶ 3; Kopec Decl., at ¶ 3.) Neither Defendant could have anticipated that it would be sued in the District based on the Bank's check-clearing activities in California and New York. Therefore, the exercise of jurisdiction in the District would violate the policy that personal jurisdiction rules exist to provide fair warning to potential defendants. *See Beverly Hills Fan*, 21 F.3d at 1565 (minimum contacts rule "helps ensure that non-residents have fair warning that a particular activity may subject them to litigation within the forum . . . . Fair warning is desirable for non-residents are thus able to organize their affairs, alleviate the risk of burdensome litigation by procuring insurance and the like, and otherwise plan for the possibility that litigation in the forum might ensue."); *Froning*, 695 F.2d at 291-93 (unreasonable to assert jurisdiction over small Iowa bank that had no contacts with forum except for check processing).

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[11] Because neither membership in a clearing house, nor ownership of a company that is itself subject to personal jurisdiction, is sufficient to justify the exercise of personal jurisdiction over a defendant, the Court's Order finding personal jurisdiction over SVPCo in the matter of *DataTreasury v. Small Value Payments Co.*, Case 2:04-CV-85 DF, (Dkt. No. 9), does not govern the present matter. Moreover, the facts above demonstrate that the Bank's situation is factually distinct from SVPCo's. Unlike SVPCo, (1) the Bank does not purposefully direct any allegedly infringing activities at the District; (2) DTC's infringement claims do not arise out of the Bank's activities in or directed at the District; and (3) assertion of personal jurisdiction over the Bank, which could not reasonably expect to be haled into court in the District, would not be fair or reasonable.

B. Venue Is Improper Under The Second Prong Of 28 U.S.C. § 1400(b) Because Defendants Do Not Have A Regular And Established Place Of Business Within The Forum Nor Have They Committed Acts Of Infringement Within The Forum

The second prong of section 1400(b) requires DTC to demonstrate that the CNB Defendants have a "regular and established place of business" within the District and that the CNB Defendants have committed infringing acts within the District. DTC cannot satisfy either requirement.

"[I]n determining whether a corporate defendant has a regular and established place of business in a district, the appropriate inquiry is whether the corporate defendant does its business in that district through a permanent and continuous presence there." *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985). This standard may be satisfied, for example, by showing that "the defendant maintains, controls, and pays for a permanent physical location from which sales are made within the district." *Johnston v. IVAC Corp.*, 681 F. Supp. 959, 962 (D. Mass. 1987).

The CNB Defendants do not own or rent any offices of any kind in the District. (Raczek Decl., at ¶¶ 2, 3.) Thus, DTC cannot meet its burden of proving that either CNB Defendant has a "permanent physical location" within the District.

Moreover, DTC cannot establish that the CNB Defendants committed infringing acts within the District. As discussed in detail above, the Corporation is merely a holding company that does not engage in check processing at all. (Hom Decl., at ¶ 3.) While the Bank does process checks, the Bank never has direct contact with any banks outside of California or New York during its check processing procedures. (Fertal Decl., at ¶¶ 2, 4.) Thus, neither CNB Defendant could have committed any allegedly infringing activities within the District.

III. DTC'S CLAIMS AGAINST THE CNB DEFENDANTS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, DTC SHOULD BE COMPELLED TO PROVIDE A MORE DEFINITE STATEMENT OF ITS CLAIMS

The CNB Complaint suffers from the same infirmities as the First Amended Complaint for Patent Infringement filed by DTC in the Wells Fargo Litigation ("Wells Fargo Amended Complaint"). In fact, aside from the identities of the parties and the omission of allegations relating to Viewpointe Archive Services and two patents-in-suit that the CNB Defendants are not accused of infringing, the operative Complaints in the two cases are virtually word-for-word identical. (*See* Dkt No. 1 (CNB Complaint); Case No. 2:06-CV-72 DF Dkt No. 3 (Wells Fargo Amended Complaint)). Like the Wells Fargo Amended Complaint, the CNB Complaint fails to satisfy Federal Rule of Civil Procedure 8(a)'s requirement of a "short and plain" statement of the claim in two key ways. First, the CNB Complaint relies only on vague allegations of infringing "transactions" or "products and services" without stating what transactions, products, or services are alleged to infringe. Second, the CNB Complaint lumps together three separate causes of actions for patent infringement without regard for the differing elements of each cause of action.

The CNB Complaint states the entire factual basis for each of DTC's infringement counts as follows:

> The Defendants have been and are infringing the [insert patent number] patent by making, using, selling, offering for sale, and/or importing in or into the United States directly, contributory, and/or by inducement, without authority, products and services that fall within the scope of the claims of the [insert patent number] patent. Unless these Defendants are enjoined by this Court, [DTC] is without an adequate remedy at law.
>
> The Defendants have been and are actively inducing and/or contributing to the infringement of the [insert patent number] patent among themselves and by others by their ownership of and participation with Small Value Payments Company, LLC.

(CNB Complaint, at ¶¶ 14-15, 17-18, 20-21, and 23-24.) Thus, the CNB Complaint never identifies a single "product" or "service" that allegedly infringes the patents-in-suit, and lumps together allegations that the CNB Defendants infringe four separate patents either (1) directly, (2) contributorily, or (3) through inducement, by either making, using, selling, offering for sale, or importing unnamed products or services or participating in unnamed transactions.

Neither Defendant has any way to glean from the vague CNB Complaint (and its many permutations of allegations) a cogent notice of which of its many products, services, or transactions is accused of infringing, which patents and claims those products, services, or transactions are accused of infringing, what specific wrongs it is alleged to have committed, or why it has been accused of virtually the same wrongs as the 55 diverse defendants in the Wells Fargo Litigation. To respond to the CNB Complaint, the CNB Defendants face the burden of reading the asserted patents (which contain a total of 190 claims) against a multitude of products and services necessary to an operating bank, without any guidance at all from the pleadings.

Thus, this pleading fails to meet even the minimal requirements of notice pleading and falls well short of the minimum standard for a plaintiff alleging infringement of a patent. *See Conley v. Gibson*, 335 U.S. 41, 47 (1957) (complaint must contain statement sufficient to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"). Courts routinely dismiss complaints in analogous situations. *See, e.g.*, *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961-62 (S.D. Cal. 1996) (dismissing complaint that accused "each of five defendants of three very different causes of action [direct, inducing, and contributory infringement] on two different patents, all in one conclusory sentence, without adequately specifying the grounds for plaintiff's belief that any of these entities have infringed"); *Hewlett-Packard Co. v. Intergraph Corp.*, Case No. C-03-2517, 2003 WL 23884794, at *1 (N.D. Cal. Sept. 6, 2003) (dismissing complaint that did not provide "fair notice" of allegations regarding which of the defendants' numerous products "directly infringes, contributorily infringes, or induces infringement of at least one claim in each of the [four] patents-in-suit"); *see also Shearing v. Optical Radiation Corp.*, 30 U.S.P.Q.2d 1878, 1880 (D. Nev. 1994) (dismissing complaint for indirect infringement under Rule 12(b)(6) when complaint did not set forth the identity of "the patented invention nor the (infringing) person making selling or using it" and when defendants were "not told by the charging allegations what they have done to participate in the [infringement] nor how they did it or could have done it").

Indeed, the CNB Complaint does not even meet the minimal pleading requirements set forth in Form 16 to the advisory committee notes to Rule 8. This standard form of patent infringement complaint requires a clear identification of the accused product. Fed. R. Civ. P. 8 advisory committee's note, Form 16 ("Defendant has for a long time past been and still is infringing those Letters Patents by making, selling, and using electric motors embodying the patented invention, and will continue to do so unless enjoined by this court.").

Dismissal of the CNB Complaint under Federal Rule of Civil Procedure 12(b)(6) is an appropriate remedy for these fundamental shortcomings. In the event this Court determines that

DTC has stated claims for patent infringement, however, the CNB Defendants alternatively submit that the CNB Complaint does not provide sufficient notice of DTC's allegations of infringement, and request a more definite statement under Federal Rule of Civil Procedure 12(e). *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002)) (motion for more definite statement appropriate "[i]f a pleading fails to specify the allegations in a manner that provides sufficient notice"); *In re Papst Licensing GmbH Patent Litigation*, Case No. Civ. A. MDL 1298, Civ. A. 99-3118, 2001 WL 179926, at *1-2 (E.D. La. Feb. 22, 2001) (ordering plaintiff to provide more definite statement when patents encompassing 503 claims were asserted against potentially hundreds of unidentified products). As detailed above, the CNB Complaint is so vague and ambiguous that the CNB Defendants cannot respond in good faith, analyze their conduct, or alert third parties to any indemnification obligations for the purported conduct at issue. Thus, DTC should be required, at the very least, set forth its claims against each CNB Defendant in reasonable detail sufficient to identify the accused products, services, or transactions.

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in the Joint Motion Of Defendants To Dismiss, Or In The Alternative, For More Definite Statement filed concurrently in the Wells Fargo Litigation, dismissal of the CNB Complaint is appropriate. The exercise of personal jurisdiction over the CNB Defendants in this case would violate the CNB Defendants' due process rights; proper venue does lie in the District; the CNB Complaint does not state a claim upon which relief may be granted; and the CNB Complaint does not set forth DTC's claims with sufficient clarity to permit the CNB Defendants to respond in good faith. Accordingly, the CNB Defendants respectfully request that the CNB Complaint be dismissed or, in the alternative, that DTC be compelled to set forth its claims against each CNB Defendant in reasonable detail sufficient to identify the accused products, services, or transactions.

Respectfully submitted,

/s/ David I. Gindler

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that David Gindler and Elizabeth Rosenblatt, counsel for Defendants, and Rod Cooper, counsel for DTC, conferred on May 29, 2006, in a good faith attempt to resolve the matter without court intervention. DTC opposes this motion.

/s/ David I. Gindler
David I. Gindler

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on June 1, 2006 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ David I. Gindler
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